

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1020

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Appellee

Docket No. 76-1020

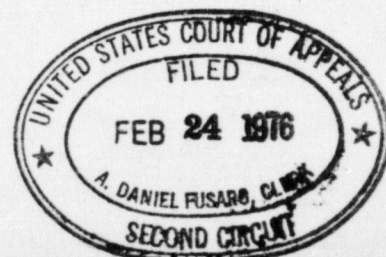
-against-

FRANKLIN WILLIAM GRASSI and
RAUL ARCE

Appellants
-----X

JOINT APPENDIX

JOHN C. CORBETT
Attorney for Appellant
FRANKLIN WILLIAM GRASSI
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201



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TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: APPLEBY
VS.	
JOSEPH LOUIS GARRO,	
> FRANKLIN WILLIAM GRASSI and	
> RAUL ARCE,	
	For Defendant: ARCE
	George Sheinberg
	66 Court Street
	Brooklyn, N.Y. U.2-8282
Bank Robbery	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DISBURSED
<i>Fine,</i>			1-9-76	Notice of Appeal (no fee)		
<i>Clerk,</i>				(Grassi) (ARCE)		
<i>Marshal,</i>						
<i>Attorney,</i>						
<i>Commissioner's Court,</i>						
<i>Witnesses,</i>						

DATE	PROCEEDINGS
7/8/75	Before MISHLER, CH.J. - Indictment filed
7/17/75	Before MISHLER, CH.J.- Case called- Defts and counsel present-Defts arraigned and enter pleas of not guilty- bail conditions contd as to deft Garro- Motion by defts Grassi and Arce for reduction of bail argued-motion granted-bail reduced to \$50,000.00 surety Co. bond or the equivalent-Trial set for 7/28/75
7/17/75	Notice of appearance filed(ARCE)
7-24-75	Before MISHLER, CH J - case called - deft GARRO & counsel E.Kelly of Legal Aid present - deft withdraws plea of not guilty to count 2 and after being advised of his rights by the court and on his own behalf enters a plea of guilty to count 2 - sentence adjd without date.

75CR 533

2

DATE	PROCEEDINGS
7-28-75	Stenographers transcript filed dated July 17, 1975.
7/28/75	Before MISHLER, CH.J.- Case called- Deft not present- counsel present-Case adjd to 7/29/75 at 10:30 A.M. for trial
7/29/75	Before WATSON, J. - Case called- Defts and counsel present- Motions for bail reduction granted- hailxxnd bail at \$25,000.00 surety bond 10% cash as to deft Grassi and Arce- case adjd to 8/25/75 at 9:30 A.M. for tri
7/29/75	By SCHIFFMAN, MAG.- ^{copy of} Orders for acceptance of cash bail filed (GRASSI and ARC
7/31/75	75 M 1033 is inserted in CR file (IND)
8/6/75	75 M 1297 and 1298 is inserted in CR file.
9/5/75	Before MISHLER, CH.J.- Case called- sentence adjd without date (GARRO)
9-5-75	Before PLATT, J - case called - referred to Mishler, Ch J.
9-5-75	Before MISHLER, CH J - case called - defts GRASSI & ARCE present with counsels - Nov. 10, 1975 for Trial.
11-10-75	Before MISHLER, CH J - adjd to Nov. 17, 1975 for trial
11-14-75	Defts Memorandum of Law filed on behalf of ARCE & GRASSI in support of defts objection to the admission of evidence relating to alleged subsequent similar crimes of both defts.
11/17/75	Before MISHLER, CH.J.- Case called- Defts Grassi and Arce present with counsel-hearing on motion to suppress held-hearing concluded - motion to suppress denied- Trial ordered and begun-jurors selected and sworn-court remanded deft Grassi on application of his counsel-Deft Arce's bail modified to extent that he remains at home except to come to court or to prepare his defense with counsel-trial contd to 11/18/75 at 9:45 A.M.
11/18/75	Before MISHLER, CH.J.- Case called- defts and counsel present- trial resume govt rests-motion by defts for judgment of acquittal denied-bail increase to \$50,000.00 surety Co. bond as to deft Arce-both defts rest-trial contd to 11/19/75 at 10:00 A.M.
11-19-75	Before MISHLER, CH J - case called - defts Grassi & Arce present with attys - trial resumed - at 12:30 PM the Jury retired for deliberations at 5:20 PM the jury returned and asked to suspend for the day and to return tomorrow for further deliberations - trial contd to 11-20-75 @ 9:45 am.
11-19-75	By MISHLER, CH J - Order of sustenance filed - lunch 15 persons.
11-20-75	By MISHLER, CH J - Order of sustenance filed - Lunch-14 persons.
11-20-75	Before MISHLER, CH J - case called - deft GRASSI & ARCE present with attys - trial resumed - at 10:00 am the jury resumed deliberations - Order of sustenance signed for lunch - at 11:40 am the jury returned and rendered a verdict of guilty on count 2 as to both defts - jury polled and jury discharged - trial concluded - jury did not have to arrive at a verdict

D. C. 105

JD:RA:lj1
#753,025

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against - JUL 8 1975

JOSEPH LOUIS GARRO, TIME AM
FRANKLIN WILLIAM GRASSI and P.M.
RAUL ARCE,

Cr. No.
(T. 18, U.S.C., §§2113(a)(d)
and 2)

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 14th day of March 1975, within the Eastern District of New York, the defendants JOSEPH LOUIS GARRO, FRANKLIN WILLIAM GRASSI and RAUL ARCE knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Astoria Federal Savings and Loan Association, 31-24 Ditmars Boulevard, Queens, New York, approximately Twenty Thousand Two Hundred Sixty-six Dollars and Seventy-two Cents (\$20,266.72), in United States currency, which money was in the care, custody, control, management and possession of the said Astoria Federal Savings and Loan Association the deposits of which Savings and Loan Association were then and there insured by the Federal Savings and Loan Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

COUNT TWO

On or about the 14th day of March 1975, within the Eastern District of New York, the defendants JOSEPH LOUIS GARRO, FRANKLIN WILLIAM GRASSI and RAUL ARCE knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Astoria Federal Savings and Loan Association, 31-24 Ditmars Boulevard, Queens, New York, approximately Twenty Thousand Two Hundred Sixty-six

- 2 -

Dollars and Seventy-two Cents (\$20,266.72), in United States currency, which money was in the care, custody, control, management and possession of the said Astoria Federal Savings and Loan Association the deposits of which Savings and Loan Association were then and there insured by the Federal Savings and Loan Insurance Corporation and in commission of this act and offense the defendants JOSEPH LOUIS GARRO, FRANKLIN WILLIAM GRASSI and RAUL ARCE did assault and place in jeopardy the life of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Sections 2113(d) and 2).

A TRUE BILL.

Richard B. Greener
FOREMAN

David P. Jones
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1
2 CHARGE OF THE HONORABLE JACOB MISHLER,
3 CHIEF UNITED STATES DISTRICT JUDGE.
4

5 (At 11:30 a.m. Judge Mishler began
6 his charge.)

7 THE COURT: Madam Forelady and ladies
8 and gentlemen of the jury:

9 We have reached that point in the
10 trial where it becomes my duty to charge you
11 on the applicable law. I think a good starting
12 place is to understand the three major elements
13 in a jury trial, the three areas of participation:

14 One is the activity of the lawyers.
15 The lawyers are partial, they are protagonists,
16 they represent clients and their zeal in the
17 defense of their clients is understandable.
18 But we must recognize that they do represent a
19 cause and that they do speak from a particular
20 point of view. That is true of the lawyer for
21 the Government and the lawyers for the defendants.

22 The Court and the jury, on the other
23 hand, are dispassionate, objective and impartial.
24 It is the only way we can have a fair jury trial.

25 The lawyers develop the evidence through

1
2 their zeal because they are adversaries
3 contesting over the issues of fact.

4 The Court and jury are objective and
5 dispassionate and impartial.

6 The role of the jury is different than
7 that of the Court. The jury is described as the
8 judges of the facts. The Court is described
9 as the judge of the law. There is a distinct
10 line of demarcation in the function and authority
11 between the Court and the jury. You and you
12 alone will decide what happened in this case as
13 it relates to the charges in the indictment,
14 that is specifically whether the Government proved
15 that these defendants participated in the bank
16 robbery, the armed bank robbery of the Astoria
17 Federal Savings & Loan Association on Ditmars
18 Boulevard in Astoria, in Queens. You will do
19 that, of course, in accordance with the law as
20 the Court charges it. Upon reaching a determination
21 on the findings of fact and upon applying the
22 law as the Court charges it to those facts, you
23 will then reach the ultimate determination as to
24 the guilt or innocence of each defendant on the
25 charges in the indictment.

1
2 I say the charges in the indictment,
3 later I will show you that there are two
4 counts, but they are in effect one count:
5 One is the graver charge, the other is the
6 lesser charge, they both concern the same
7 event.

8 Each defendant, of course, is entitled
9 to your separate and individual consideration.
10 You will determine after careful consideration
11 of all the evidence the guilt of each defendant
12 based on the evidence against that defendant.
13 Though this is a joint trial, the evidence must
14 be appraised separately against each defendant.

15 I think understanding the function and
16 the authority of each participant in the trial
17 and respecting the authority of the other, each
18 of us can more effectively perform our own
19 duties.

20 We start in all criminal trials with a
21 presumption of innocence. The presumption of
22 innocence is a strong presumption in Anglo-
23 American jurisprudence, which in effect clothes
24 the defendant with the presumption of innocence.
25 It means that you must conclude at the outset

1
2 of the trial that both defendants are innocent
3 of the charges in the indictment and that
4 presumption is enough to acquit a defendant.
5 In order to overcome the presumption, the
6 Government must prove the guilt of the defendant
7 by proof beyond a reasonable doubt, so that if
8 the Government fails in sustaining that burden
9 then the presumption of innocence prevails and
10 is enough to acquit a defendant.

11 Now, a reasonable doubt is a doubt which
12 a reasonable person has after weighing all the
13 evidence and considering all the evidence in the
14 case. It is a doubt based on reason, logic,
15 common sense, it is a doubt that is present
16 from examining the record and a doubt that arises
17 from the state of the record. It is not a vague,
18 speculative or imaginary doubt; it is not a
19 doubt based on suspicion, conjecture or surmise.
20 It is not the kind of a doubt that a juror
21 might have because of the unpleasant task in
22 finding a defendant guilty of the crime charged.
23 A reasonable doubt is the kind of a doubt that
24 would cause a reasonable person to hesitate to
25 act in a matter of importance to himself or

1
2 herself. Proof beyond a reasonable doubt,
3 therefore, is proof of such a convincing
4 character that you would be willing to rely
5 and act upon it unhesitatingly in the most
6 important of your own affairs.

7 The Government is not required to
8 prove the guilt of the defendant to a
9 mathematical certainty, it is not required to
10 prove the guilt of the defendant beyond all
11 doubt. The Government's burden is heavy.
12 It is to prove the guilt of the defendant
13 beyond a reasonable doubt.

14 The Government need not prove that
15 every bit of evidence offered in the trial
16 before you is true beyond a reasonable doubt.
17 The Government's burden is to prove all the
18 essential elements of the crime charged beyond
19 a reasonable doubt.

20 Later in the charge I will enumerate
21 the essential elements of the crimes charged
22 here.

23 As I said, the defendant need not
24 produce any evidence, the defendant has the
25 right to rely on the failure of the Government

1
2 to prove his guilt.

3 Throughout this charge I may use the
4 singular or the plural; in both cases, of
5 course, it means both unless I single a defendant
6 out for a particular charge.

7 What is evidence:

8 Evidence is the method which the law
9 uses to prove a disputed fact or to disprove a
10 disputed fact.

11 Evidence is generally classified as
12 direct evidence or as circumstantial evidence,
13 sometimes called indirect evidence.

14 Direct evidence is the testimony of
15 witnesses as to what the witness saw or heard.
16 Circumstantial evidence is a method of proving
17 or disproving a fact by the jury drawing
18 reasonable inferences based on experience and
19 common sense from established facts.

20 I have gotten accustomed to make the
21 distinction clear through an example, and the
22 example I use usually is a hypothetical situation:

23 Let us assume the jury was sitting here
24 as a jury to determine liability in a personal
25 injury action, let us assume that Plaintiff A

1
2 claims that Defendant B was negligent in
3 that the defendant passed a stop sign without
4 stopping and struck the plaintiff.

5 Let us assume B was driving his car
6 along a particular street near an intersection
7 where the stop sign was erected.

8 Now, if my courtroom deputy and myself
9 were at the corner at the particular time and
10 place, we might be witnesses to the accident,
11 each of us giving different types of testimony
12 concerning the same issue of fact.

13 The important thing is to identify the
14 disputed issue of fact. In this case the
15 plaintiff claims the defendant passed a stop
16 sign without stopping. The defendant says,
17 no, I stopped and then I proceeded.

18 Let us assume that I was facing the
19 roadway speaking with my courtroom deputy and
20 he had his back to the roadway and his back to
21 the stop sign. If I were called to the stand
22 to testify concerning that event, I might very
23 well say:

24 I was talking with Mr. Adler, my court-
25 room deputy, I noticed the defendant's motor

1
2 vehicle proceeding at about 65 or 70 miles
3 an hour, he was driving a white Cadillac, and
4 I saw him pass the stop sign at about the same
5 speed and continue past it and strike the
6 plaintiff.

7 Now, that is direct evidence on that
8 issue.

9 My courtroom deputy didn't see the car
10 pass the stop sign, but he is competent to
11 testify concerning the circumstances from which
12 a jury might draw the reasonable inference that
13 that is what happened.

14 He might say that as he was talking
15 with me a car entered the area of his peripheral
16 vision, he noticed that it was proceeding at
17 about 70 miles an hour, he lost sight of it for
18 about 150 feet and two or three seconds later
19 when he turned left he saw the motor vehicle
20 proceed at the same rate of speed and saw it
21 strike the plaintiff.

22 Now I think on the basis of his testimony
23 you might draw the fair and reasonable inference,
24 if you believe his testimony, that the motor
25 vehicle passed the stop sign without stopping;

1
2 that it traversed about 150 feet in two or
3 three seconds.

4 Those are the circumstances from which
5 the jury would draw a reasonable inference
6 based upon experience and common sense.

7 Of course the jury here is equipped with
8 the experience and good common sense that
9 maturity gives us, and I am sure that you will
10 deal with the evidence in reaching your deter-
11 minations as mature citizens and you are free
12 to use, you are invited to use your good common
13 sense and experience.

14 The record in the case, the evidence in
15 the case is the sworn testimony of the witnesses,
16 the exhibits received in evidence, the facts
17 which may have been admitted or stipulated and
18 the facts which the Court took judicial notice.

19 If you recall, I said that I took
20 judicial notice that March 13, 1975 was a Thursday.

21 I think it is important to understand
22 what is not evidence in the case to more clearly
23 define what is evidence in the case:

24 The statements made by lawyers in their
25 openings and in their summations is not evidence.

1
2 As I indicated at the outset, they serve a
3 very useful purpose. In the openings, they,
4 the lawyers, told you what their positions
5 were, and I suspect it served the purpose, it
6 made it easier for you to follow the testimony
7 as it came in.

8 The closing arguments which argue the
9 evidence in the case and sharpened the issues
10 told you what the lawyers regard as the
11 important issues in the case. The defendants
12 argued theories of exculpability, in effect
13 they said the Government failed to prove the
14 guilt of the defendants, each one arguing
15 separately, of course, and that is the deter-
16 mination which you will make:

17 Did the Government prove the defendants
18 guilty by proof beyond a reasonable doubt.
19 The defendants said, no, and offered theories
20 of exculpability, arguing that the defendants
21 were not guilty. The Government on the other
22 hand argued theories of inculpability, arguing
23 that the Government did prove the guilt of the
24 defendants by proof beyond a reasonable doubt.

25 You are obviously not going to take

1
2 all the arguments by both sides. That would
3 be impossible. You may decide that one of the
4 arguments made by counsel or more than one of
5 the arguments or all the arguments made by
6 counsel are attractive, and that, too, is a
7 tool to lead you to the truth. You are free to
8 reject any or all of the arguments made by
9 counsel. Of course, again, they are helpful
10 tools, but they are not evidence.

11 You will recall that at least one lawyer
12 read from the transcript, and I assume that that
13 portion he read is quite accurate, I don't find
14 any intentional distortion of the evidence, but
15 he in effect based it on his, the lawyer's
16 recollection and it is your recollection that
17 counts.

18 The statements of the Court:

19 I do not recall making any statements,
20 but if I did it is not evidence. I am just
21 here as the judge of the law. I am not here to
22 tell you how to decide the case. I have no
23 opinion, one way or the other, in this case.
24 I leave it solely with you.

25 While I am at it, I might advise you

1
2 that I did ask a few questions. Don't attach
3 any special significance to the questions that
4 I asked. I am a lawyer in robes and at times
5 when I hear some testimony the issue appears
6 fudgy to me, a little unclear. It may have
7 been perfectly clear to you but I just assume
8 that if I don't quite understand it maybe you
9 don't - - I could be 100% wrong. I ask the
10 questions only to clear up any area that I find
11 is a little unclear.

12 At times evidence was stricken from the
13 record. Well, it is not in the record, and as
14 I directed the Reporter to strike it from the
15 record physically, so I ask you to figuratively
16 strike it from your recollection and your
17 consideration.

18 At times objection was sustained to a
19 question asked. The question was not answered
20 and you may not speculate on what the answer
21 might have been if the witness were allowed to
22 answer, and this on the same theory that it is
23 not in the record and you may only consider
24 what is in the record.

25 I would like to distinguish between

1
2 inference and presumption, I have used both
3 terms. An inference is a conclusion which
4 reason and common sense leads the jury to draw
5 from the facts which have been established by
6 the evidence in the case. The example of that
7 is the method of proving or disproving a
8 disputed fact through circumstantial evidence.

9 A presumption, on the other hand, is a
10 conclusion which the law requires the jury to
11 make and continues only so long as it is not
12 overcome or outweighed by evidence in the case
13 to the contrary. Unless and until the presumption
14 is so outweighed, the jury is bound to find in
15 accordance with the presumption - - and of course
16 the presumption of that is the presumption of
17 innocence.

18 You, the jurors, are the sole judges
19 of the credibility of the witnesses, which
20 means the believability of their testimony and
21 the weight their testimony deserves.

22 Scrutinize the testimony given and the
23 circumstances under which each witness testified
24 and every matter in evidence which tends to show
25 whether a witness is worthy of belief.

1
2 Consider each witness' intelligence,
3 consider the motive of each witness and his
4 state of mind; why is the witness testifying,
5 what is the state of mind.

6 Take into consideration the demeanor
7 of the witness on the witness stand, take into
8 consideration the witness' own ability to
9 observe the matters as to which he has testified,
10 whether he has impressed you with having an
11 accurate recollection on those matters.

12 Also, the relationship each witness
13 might bear to either side of the case, the manner
14 in which each witness might be affected by the
15 outcome of the case, the extent to which a witness
16 is corroborated or contradicted by other testimony
17 in the case.

18 The witness Joseph Garro testified that
19 he participated in the crime charged. His
20 statement that he participated classifies him as
21 an alleged accomplice. Alleged accomplices are
22 not incompetent to testify because of their par-
23 ticipation in the crime charged. On the contrary,
24 the testimony of an alleged accomplice alone if
25 believed by the jury to be true beyond a reasonable

1
2 doubt may be of sufficient weight to sustain
3 a verdict of guilty, even though not corroborated
4 or supported by other evidence in the case.
5 However the jury should keep in mind that such
6 testimony is to be received with caution and
7 weighed with great care. You shouldn't convict
8 a defendant on the uncorroborated testimony of
9 an alleged accomplice unless you believe that
10 testimony to be true beyond a reasonable doubt.

11 The testimony of the witness may be
12 discredited or impeached by showing that the
13 witness has been convicted of a felony, that is
14 a crime punishable by imprisonment for a term
15 of years. Prior conviction does not render a
16 witness incompetent to testify, but again is
17 merely a circumstance which you may consider
18 in determining the credibility of the witness.
19 It is the province of the jury alone to
20 determine the effect that a felony conviction
21 has on the testimony of a witness.

22 Some evidence has been offered to show
23 that at some time prior to the witness taking
24 the stand the witness made a statement that is
25 inconsistent with the testimony given before you:

1
2 It is called impeaching testimony. I think
3 it is obvious to most of us that witnesses
4 intend to tell the truth and attempt to tell
5 the truth but in retelling an incident tell
6 it differently each time with the retelling.
7 If a witness on recounting a version of what
8 happened a number of times said it exactly
9 the same way, in exactly the same language
10 with exactly the same pauses and gestures,
11 you would have reason to question the veracity
12 of this witness, you would think it was well
13 rehearsed. On the other hand, there are times
14 when we recognize a prior version as being
15 entirely different or materially different
16 than the one told the second time or a third
17 time. At times there might just be error,
18 something overlooked, something left out: At
19 times they are intentional lies. Well, the
20 jury and the jury alone determines, first,
21 whether any prior statement was inconsistent
22 with the testimony given at the trial. The
23 jury and the jury alone is to determine whether
24 it is inconsistent as to a material fact and
25 having determined that, the jury alone determines

1
2 the effect a prior inconsistent statement
3 has on the testimony given before you.

4 The law does not compel a defendant
5 in a criminal case to take the witness stand
6 and testify. No presumption of guilt may be
7 raised and no unfavorable inference may be
8 drawn of any kind by the failure of a defendant
9 to testify. A defendant who is previously
10 charged may rely on the failure of the Govern-
11 ment to prove its case. It would be improper
12 for you to discuss the failure of the defendant
13 to testify during your deliberations.

14 If a witness is shown to have knowingly
15 testified under oath falsely as to a material
16 fact, you have the right to disregard all that
17 witness' testimony on the ground that that
18 witness is unworthy of belief. On the other
19 hand, you have the right, if you wish, to reject
20 - - well, the obligation to reject that portion
21 of the testimony that you recognize is false
22 and to take that portion under consideration
23 that you find credible. The principle merely
24 underscores the wide discretion the jury has
25 in weighing and assessing credibility.

1
2 In this case the witness Henry Faison,
3 who was in charge of security at Korvettes
4 testified as follows in answer to the question
5 put by Mr. Appleby:

6 "Now, I'd like you to look around this
7 courtroom very carefully and tell the
8 members of the jury whether you recognize
9 anybody in this courtroom as being
10 similar in appearance to one of the men
11 that you saw that day that caught your
12 attention."

13 And the answer was:

14 "The gentleman with the plaid jacket."

15 He pointed to the defendant Raul Arce.

16 He also testified that he picked out a
17 picture, it is Government's Exhibit Number 1,
18 and he said it in answer to the following question:

19 "Did you pick out any one of these
20 photographs as being similar to the
21 appearance of the man you saw through
22 the window that day?"

23 The answer:

24 "This one right here."

25 And he picked out that exhibit,

Exhibit Number 1.

Now, this is called identification testimony, and identification testimony is an impression or belief, an impression by the witness, and its value depends on the opportunity the witness had to observe the offender at the time he said he saw the individual and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

Whether the witness had the capacity and adequate opportunity to observe the party he pointed out. This will depend on all the circumstances at the time the witness observed the party pointed out, this includes how long or short a time the witness saw the individual, how far or how close the witness was from the individual, the lighting conditions at the time, the position from which the witness viewed the individual, the emotional state of the witness at the time. Take into consideration the strength of the identification, was the

1
2 witness absolutely sure, reasonable sure or
3 in such serious doubt as to the resemblance
4 to the offender or to the party identified
5 that the identification is worthless.

6 Scrutinize all the circumstances under
7 which the identification was made prior to
8 trial. If the identification was through a
9 spread of photographs, take into consideration
10 when the identification was made, was it soon
11 after the crime was committed or how long
12 a time had elapsed. Did the witness pick
13 the accused out from a group similar to the person
14 identified?

15 Now we turn to the charge in the indictment.
16 I said "charge" in the singular, but I will
17 read two counts. When I read these two counts,
18 I am going to ask you to keep in mind that
19 when I read the second count it will be read exactly
20 like the first count, verbatim, except for the
21 last portion, and that has special significance.

22 Count One charges:

23 "On or about the 14th day of March,
24 1975, within the Eastern District of New York,
25

1
2 the defendants Joseph Louis Carro, Franklin
3 William Grassi and Paul Arce knowingly and
4 willfully, by force, violence and intimidation,
5 did take from the person and presence of
6 employees of the Astoria Federal Savings & Loan
7 Association, 31-24 Ditmars Boulevard, Queens,
8 New York, approximately \$20,266.72, in United
9 States currency, which money was in the care,
10 custody, control, management and possession of
11 the said Astoria Federal Savings & Loan
12 Association the deposits of which savings and
13 loan association were then and there insured
14 by the Federal Savings & Loan Insurance
15 Corporation."

16 That is Count One, and it cites a
17 certain section that I will read later, it
18 cites Title 18, United States Code, Sections
19 2113(a) and 2.

20 I will read Section 2113(a) and you
21 will find some of the language in the section
22 is incorporated in the count.

23 Now here is Count Two, and as I say,
24 it reads exactly like Count One for the first
25 portion.

Count Two:

"On or about the 14th day of March, 1975, within the Eastern District of New York, the defendants Joseph Louis Garro, Franklin William Grassi and Raul Arce knowingly and willfully, by force, violence and intimidation, did take from the person and presence of employees of the Astoria Federal Savings & Loan Association, 31-24 Ditmars Boulevard, Queens, New York, approximately \$20,266.72, in United States currency, which money was in the care, custody, control, management and possession of the said Astoria Federal Savings & Loan Association the deposits of which savings and loan association were then and there insured by the Federal Savings & Loan Insurance Corporation" - - and that is as far as Count One went, and this is the addition:

"and in commission of this act and offense the defendants Joseph Louis Garro, Franklin William Grassi and Raul Arce did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous

1
2 weapon."

3 This is in violation of Title 18,
4 United States Code, Section 2113(d) and 2.

5 So you see, the addition referred to
6 is placing lives in jeopardy and assaulting
7 with a dangerous weapon.

8 It is significant because Count Two
9 is considered the graver of the offenses
10 because it is something additional to the crime
11 charged in Count One, it has an additional
12 element. That is why when I give you the case
13 for consideration, I will ask you to consider
14 Count Two first to determine whether the Govern-
15 ment proved Count Two beyond a reasonable doubt.
16 If the Government proved Count Two, then you
17 won't even consider Count One, but you will
18 consider Count One if you find the defendant
19 or defendants not guilty in Count Two; as I
20 say, then you will consider Count One.

21 The charge in the indictment or the
22 charges in the indictment, whichever you prefer,
23 is based on a statute. Most of our Federal
24 laws is codified and Title 18 is entitled,
25 "Crimes and Criminal Procedure." It is the

1
2 Congress who determines what is a crime.

3 This is what the statute says in
4 pertinent part:

5 "Whoever, by force and violence, or
6 by intimidation, takes, or attempts to take,
7 from the person or presence of another any
8 property or money or any other thing of value
9 belonging to, or in the care, custody, control,
10 management or possession of, any bank, or any
11 savings and loan association," commits the
12 crime.

13 That is 2113(a).

14 There is another subdivision that adds
15 the graver element and makes the graver crime,
16 and it says this:

17 "Whoever, in committing, or in attempting
18 to commit, any offense defined in Subsection (a),
19 assaults any person or puts in jeopardy the life
20 of any person by the use of a dangerous weapon
21 or device," commits the graver offense.

22 Now a bank is defined as any member of
23 the Federal Reserve System, any bank, banking
24 association, trust company, savings bank, or
25 other banking institution organized or operating

1
2 under the laws of the United States.

3 The Government must prove the following
4 essential elements of the crime charged beyond
5 a reasonable doubt, and I am going to Count
6 One first, and I will repeat the first four
7 elements when I come to Count Two, they will be
8 exactly the same:

9 One, That on or about March 14, 1975
10 the defendant, and I say consider each one
11 separately, first the defendant Frank William
12 Grassi in one case then the defendant Raul Arce,
13 by force, violence or intimidation took from
14 the person or presence of the teller of the
15 Astoria Federal Savings & Loan Association the
16 sum of approximately \$20,266.72. The Government
17 does not have to prove the \$20,266.72, if the
18 Government proves it was approximately \$12,000
19 then it has proved the sum taken;

20 Two, Doing such acts knowingly and
21 willfully;

22 And, third, That the Astoria Federal
23 Savings and Loan Association was a savings and
24 loan association insured by the Federal Savings
25 & Loan Association Insurance Corporation.

1
2 So the Government must prove those
3 three essential elements of the crime charged
4 to sustain its burden in Count One.

5 Now in Count Two, taking into con-
6 sideration the additional element, and I will
7 repeat what has to be proved in Count Two, I
8 will try to use the same words but you see I
9 am charging from just brief notes so it may
10 not be the same language but the substance will
11 be the same, must prove beyond a reasonable
12 doubt;

13 One, That on or about the 14th day of
14 March, 1975 the defendant Franklin William
15 Grassi, and you consider his case, the defendant
16 Raul Arce, and you consider his case, by force,
17 violence and intimidation took from the person
18 and presence of the tellers of the Astoria
19 Federal Savings & Loan Association approximately
20 \$20,226.72, which money was in the care, custody,
21 control and management or possession of the
22 Astoria Federal Savings & Loan Association;

23 Two, That such acts were performed
24 knowingly and willfully;

25 Three, That the Astoria Federal Savings

1
2 & Loan Association was a savings and loan
3 association insured by the Federal Savings
4 & Loan Insurance Corporation;

5 Four, and this is the additional
6 element, the act or acts of assaulting or
7 putting in jeopardy the life of any person
8 by the use of a dangerous weapon or device
9 while engaged in stealing such money from the
10 bank as charged.

11 Now in every criminal case there is
12 an element, an essential element of the crime,
13 intent. It is expressed in the statute by
14 the use of a phrase, "knowingly and willfully."

15 "Knowingly" means that while performing
16 the act the defendant was aware of what he was
17 doing, that it wasn't pure accident, mistake or
18 any other innocent reason. An act is done
19 "willfully" when it is done voluntarily and
20 intentionally, understanding that it is a
21 violation of law. To take "by intimidation,"
22 means to take by putting the employees in fear
23 of bodily harm. Now such fear must arise from
24 the willful conduct of the accused rather than
25 from the mere temperamental timidity of the

1
2 employee.

3 The definition of assault upon a
4 person is a willful attempt or threat to
5 inflict injury upon the person of another
6 when coupled with an apparent present
7 ability to do so, or any intentional display
8 of force such as would give the victim reason
9 to fear or expect immediate bodily harm.

10 The definition of the phrase, "to put
11 in jeopardy the life of a person by use of a
12 dangerous weapon or device," and, first, a
13 dangerous weapon or device includes anything
14 capable of being readily operated, manipulated,
15 wielded, or otherwise used by one person to
16 inflict severe bodily harm or injury upon
17 another person. So, an operable firearm such
18 as a handgun which is capable of firing a
19 bullet may be found to be a dangerous weapon
20 or device.

21 To "put in jeopardy the life" of another
22 person "by the use of a dangerous weapon or
23 device," means, then, to expose such person to
24 the risk of death.

25 You will shortly be excused to deliberate

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2 on the matter before you. As I indicated,
3 you will first consider whether the Government
4 has proved all the essential elements of the
5 crime charged in Count Two. If you find the
6 Government has not, then you will go to Count
7 One. If you find the defendant, and this
8 refers to either or both defendants, not guilty
9 of Count Two, then you will consider Count One
10 and you will arrive at a determination as to
11 the guilt or innocence of both defendants as to
12 Count One.

13 During your deliberations, you may have
14 occasion to ask the Court to read some of the
15 testimony. It has been transcribed.

16 Make any request for any information
17 through your foreman.

18 If you want to see any of the exhibits,
19 just write a note. If you want to see a
20 specific exhibit, then signify so. If you want
21 to see all the exhibits, I will send them all in.

22 There were some exhibits that were
23 marked for identification. If they were marked
24 only for identification and not in evidence,
25 they are not a part of the record. So when you

1
2 ask for exhibits, I cannot send in matters
3 that are not in the record.

4 When you send a note, don't ask me to
5 answer any questions. For example, frequently
6 I get a note asking me what the witness
7 testified about a certain matter. Well, I
8 cannot tell you that, this would be my version
9 of what the witness testified to, and I want to
10 make certain that I in no way interfere with
11 your arriving at a verdict, this is solely your
12 authority and your function. So what you should
13 do is ask in your note that the testimony of
14 so-and-so be read. You might identify the
15 subject matter and what I will do is read it
16 back to you.

17 Don't tell me how you stand at any time
18 during your deliberations, don't tell me you
19 are 6 to 6, 10 to 2, 11 to 1. When you have
20 arrived at a unanimous verdict, then just tell
21 me, We have a verdict. Don't tell me what the
22 verdict is because that is announced for the
23 first time in open court.

24 When you tell me you have a verdict, I
25 will call the jury in, I will ask the foreman

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2 to stand, and I will say:

3 In the case of the United States
4 against Franklin William Grassi and Raul Arce,
5 how do you find the defendants as to Count Two,
6 guilty or not guilty?

7 I will first go to Franklin William
8 Grassi and ask, How do you find Franklin William
9 Grassi as to Count Two, guilty or not guilty?

10 If you say guilty, then I won't ask you
11 about Count One. If you say not guilty, then I
12 will say:

13 How do you find the defendant Franklin
14 William Grassi as to Count One, guilty or not
15 guilty, and then you will give me your verdict.

16 Then you will sit down and I will turn
17 to Juror Number 2 and I will say in effect:

18 You have heard the verdict as rendered
19 by the foreman, is that your verdict?

20 And then again Juror Number 3, 4 and so
21 forth to Juror Number 12.

22 If all the jurors agree in open court
23 as to the verdict, then for the first time it
24 becomes the verdict of the jury.

25 Now each juror must decide the case

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2 for himself or herself. There are two extreme
3 positions that are improper:

4 One is the juror that comes into the
5 jury room and says in effect, Well, you decide
6 the case and I will go along with whatever you
7 say. They call me Agreeable Abe or any other
8 description. That would not give the litigants
9 a unanimous verdict of twelve jurors.

10 The other is the juror that comes into
11 the jury room and in effect says, Well, I have
12 already made up my mind and when the other eleven
13 of you come around to my way of thinking, we will
14 have a verdict. That intransigent, obdurate position
15 is obviously wrong, too.

16 The deliberation process is an exchange
17 of views. Go over the evidence. There are
18 times when you may arrive at a tentative verdict
19 and then after going over the evidence with your
20 fellow jurors you might be convinced that the first
21 determination was wrong. There is nothing wrong in
22 changing your mind if it is supported by
23 the evidence.

24 I cannot think of anything else at this
25 time.

1
2 I would ask you to take leave of
3 the courtroom. Don't start your deliberations,
4 I just want to have a talk with the lawyers,
5 then I will call you back into the courtroom.

6 The jury is excused.

7 (At 12:20 p.m. the jury left the courtroom.)

8 THE COURT: Mr. Appleby, any exception
9 or addition?

10 MR. APPLEBY: Yes, your Honor.

11 You will recall that Grassi never
12 carried a gun into the bank - -

13 MR. SHEINBERG: Oh, I am sorry.

14 MR. CORBETT: That Grassi never carried
15 a gun into the bank, but it is possible of
16 course that he aided and abetted the assault
17 upon the customers and employees, and unless
18 the Government gets a charge with respect to
19 aiding and abetting they couldn't possibly
20 find Grassi guilty on Count One - - Count Two,
21 excuse me.

22 THE COURT: All right.

23 Anything else?

24 MR. SHEINBERG: I have an exception to
25 the charge.

1
2 THE COURT: To what part of the
3 charge do you except to?

4 MR. SHEINBERG: On behalf of Raul Arce,
5 I respectfully except to your Honor's reading
6 a portion of Mr. Faison's testimony and
7 except to the selection of the photograph as
8 highlighting the testimony of a witness by the
9 Court, and that is the province of the jury to
10 deliberate on all of the testimony and such
11 testimony should not be highlighted by a
12 specific passage of testimony read by the Court.

13 THE COURT: I did that for a special
14 reason, I was going to say that Mr. Faison
15 identified the defendant in court and he picked
16 out the defendant's photograph.

17 Now, I think you conceded that Govern-
18 ment's Exhibit Number 1 was the defendant Arce,
19 but I didn't want to say that and I remember
20 that as it was going to the jury I said, Well,
21 you can bring it to the jury, that is the
22 photograph, but it isn't necessary, ~~and~~ ^{It} seemed
23 to ~~be~~ ^{he} it wasn't a definite concession and that
24 was why I was reluctant to say that, so instead
25 of inviting a complaint about whether ^{he} ~~it~~ was

1
2 identified, because you made that argument
3 when Mr. Appleby said, Let the record show
4 he identified him, and you said it is not an
5 identification and you made an objection, I
6 introduced it that way.

7 Now, if you want to, I will do it
8 differently and say that the witness pointed
9 out the defendant and to just disregard what
10 I said, and I will talk about identification
11 testimony in that respect.

12 MR. SHEINBERG: No, I wouldn't want
13 that, I don't want that, Judge.

14 THE COURT: This was only because you
15 made an objection.

16 MR. SHEINBERG: I will withdraw my
17 exception to that portion of the charge.

18 THE COURT: Anything else?

19 MR. CORBETT: Nothing else, your Honor.

20 THE COURT: I will give the aiding and
21 abetting charge.

22 Bring the jury in.

23 (At 12:25 p.m. the jury took its place
24 in the jury box.)

25 THE COURT: If you credit the testimony

1 of Mr. Garrow, the evidence that the 519
2 defendant Arce had a gun but that Mr. Grassi
3 did not, the defendant Grassi can nevertheless
4 be convicted of the graver crime charged
5 in Count Two if the Government proves
6 beyond a reasonable doubt that he aided
7 and abetted in the commission of the
8 graver charge.

9 Section 2 of Title 18 says as follows:

10 "Whoever commits an offense against
11 the United States or aids, abets, consels, commands,
12 induces or procures its commission, is punishable as
13 a principal."

14 Now that means that it isn't necessary
15 for the Government to prove that the defendant
16 Grassi himself committed each act that comprises
17 the crime charged. If he knowingly and willfully
18 participated in the crime charged and thus aid
19 and abets in its commission, he, too, is guilty
20 as a principal.

21 Now shall I excuse the jury for any
22 further discussion?

23 Gentlemen, does anyone want --

24 MR. SHEINBERG: No, your Honor.

25 MR. CORBETT: No, your Honor, nothing